



In the Matter of:

**MARRITA M. LEVEILLE
and
DANIEL J. LEVEILLE,**

COMPLAINANTS,

v.

**NEW YORK AIR NATIONAL GUARD,
and SECRETARY OF THE AIR FORCE,^{1/}**

RESPONDENT.

ARB CASE NO. 98-079

**ALJ CASE NOS. 94-TSC-3
94-TSC-4**

DATE: October 25, 1999

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

David K. Colapinto, Esq.; Stephen M. Kohn, Esq.; Jason S. Garber, *Kohn, Kohn & Colapinto, P.C., Washington, D.C.*

For the Respondent:

Maj. Paul J. Sausville, Legal Counsel, *New York Army National Guard, Latham, New York*

DECISION AND ORDER ON DAMAGES

This case originally came before the Labor Department as complaints filed by two persons, Marrita Leveille and her husband, Daniel Leveille, alleging that their former employer, the New York Air National Guard (Air National Guard), discriminated against them by engaging in conduct prohibited under the whistleblower protection provisions of six environmental

^{1/} Only the New York Air National Guard was identified as a respondent in the earlier proceedings before the Administrative Law Judge and the Secretary of Labor. Counsel for the Air National Guard represents that the correct respondent is the Secretary of the Air Force (*see* Respondent's Rebuttal Brief at 16, n.5). Complainant has not objected to the addition to this second respondent; the complaint therefore is amended to reflect the Secretary of the Air Force as a respondent.

statutes.^{2/} In 1995, the Secretary of Labor ruled in favor of Marrita Leveille on her discrimination complaint, finding that the Air National Guard illegally blacklisted her when, because of her protected activity, it gave unfavorable employment references to a company known as Documented Reference Check^{3/} and also to the United States Office of Personnel Management. Decision and Order of Remand, Dec. 11, 1995. The Secretary dismissed Daniel Leveille’s complaint of discrimination, ruling that it was filed untimely. *Id.* Having ruled in favor of Marrita Leveille on the merits of her complaint, the Secretary remanded the case to the Administrative Law Judge to make recommendations on compensatory damages and attorney fees and costs owed to her. *Id.* Because Marrita Leveille’s claim is the sole action still pending, we refer to her in this decision as the Complainant.

On remand, the case was assigned to a second ALJ to determine the damages to be awarded. The ALJ compared this case to other whistleblower cases in which damages have been awarded for mental anguish and recommended an award of \$45,000 for mental distress, \$529.28 for past medical expenses and \$10,000 for future medical expenses. R. D. and O. on Remand at 8. In addition, the ALJ recommended an award of \$25,000 for damage to Complainant’s professional reputation. *Id.* at 9. However, the ALJ recommended that no award of exemplary damages be made because the Air National Guard did not have the state of mind required to justify such damages, *i.e.*, it did not act with a reckless or callous indifference to the effects of its action. Finally, in a Recommended Supplemental Decision and Order issued April 17, 1998, the ALJ recommended an award of \$113,085 in attorney fees for services rendered through March 11, 1998, and an award of \$12,930.13 in costs.^{4/} The ALJ also recommended an additional award of \$830.81 to Complainant for costs incurred between June 18, 1996, and March 11, 1998.

^{2/} The Toxic Substances Control Act, 15 U.S.C. §2622(1994); the Safe Drinking Water Act, 42 U.S.C. §300j-9(I) (1994); the Clean Air Act, 42 U.S.C. §7622 (1994); the Solid Waste Disposal Act, 42 U.S.C. §6971 (1994); the Clean Water Act, 33 U.S.C. §1367 (1994); and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9610 (1994).

^{3/} Documented Reference Check is a company that obtains information that a previous employer would provide to a prospective employer about individuals who engage its services.

^{4/} The ALJ’s recommended award for attorney fees and costs is divided into two time segments:

	Before 6/18/96	6/18/96 - 3/18/98	Total
Attorney fees	\$72,452.50	\$40,632.50	\$113,085.00
Costs	\$12,736.07	\$194.06	\$12,930.13

See ALJ Recommended Supplemental Dec. and Ord., Apr. 17, 1998.

The ALJ's decisions were forwarded for review by this Board^{5/} pursuant to the automatic review provisions for whistleblower cases under the environmental laws. 29 C.F.R. §24.6(a) (1997).^{6/}

Neither party has challenged the ALJ's award of attorney fees and costs. However, Complainant seeks review of the ALJ's recommendations on the award of compensatory damages for mental anguish and damage to reputation, and also the ALJ's denial of an award for punitive damages. Complainant requests substantial increases in the compensatory damages awarded, and argues that an award of punitive damages is justified by the evidence in the case. The Air National Guard expresses support for the ALJ's recommendations on compensatory and punitive damages, arguing that the compensatory damage awards should be sustained as reasonable and that the ALJ was correct when he denied punitive damages.

DISCUSSION

I. Standard of Review.

The regulations governing adjudications by the Department of Labor's Office of Administrative Law Judges provide that "[u]nless otherwise required by statute or regulations, hearings shall be conducted in conformance with the Administrative Procedure Act, 5 U.S.C. 554." 29 C.F.R. §18.26 (1998). The environmental acts and the regulations implementing those acts are silent concerning the burden of proof to be applied in whistleblower cases. Accordingly, the APA's "preponderance of the evidence" standard governs this case. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 102 (1981).

In reviewing an ALJ recommended decision under the whistleblower provisions of the environmental acts, this Board also is subject to the "preponderance of the evidence standard." *Ewald v. Commonwealth of Virginia*, Case No. 89-SDW-1, Sec. Dec. and Rem. Ord. (Apr. 20, 1995). The Board is not bound by the ALJ decision, but rather retains complete freedom of decision:

^{5/} On April, 17, 1996, the Secretary of Labor issued Secretary's Order 2-96, which delegated authority to issue final agency decisions under the environmental statutes to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (1996). Final procedural revisions to the regulations (61 Fed. Reg. 19982) implementing this reorganization were promulgated simultaneously.

^{6/} These regulations were amended in 1998 to provide, *inter alia*, for ARB review of environmental "whistleblower" complaints only upon the filing of an appeal by a party aggrieved by an Administrative Law Judge's decision. *See* 63 Fed. Reg. 6614 (Feb. 9, 1998). Here, the Administrative Law Judge issued a recommended decision and order on December 3, 1997; accordingly, this matter is before the Board pursuant to the automatic review provision of the pre-1998 regulation.

In making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision, as though it had heard the evidence itself. This follows from the fact that a recommended decision is advisory in nature. [citation omitted] Similarly, the third sentence of section [557(b)] provides that “On appeal from or review of the initial decisions of such [hearing] officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision.

Att’y Gen. Manual on the Administrative Procedure Act, Chap. VII §8 pp. 83-84 (1947); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (same).

II. Compensatory damage for emotional distress or mental anguish.

By authorizing the award of compensatory damages, the environmental statutes have created a “species of tort liability” in favor of persons who are the objects of unlawful discrimination. Compensatory damages are designed to compensate discriminatees not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering. *Martin v. Dep’t of the Army*, ARB Case No. 96-131, ALJ Case No. 96-131, ARB Dec. and Ord. (July 30, 1999), 1999 WL 702416 at *13, *citing Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 305-307 (1986).

The Secretary and this Board have long held that compensatory damage awards for emotional distress or mental anguish should be similar to awards made in other cases involving comparable degrees of injury. The Board recently reaffirmed this principle in a case under the analogous whistleblower protection provisions of the Energy Reorganization Act, noting that “an important criterion for determining whether an award of compensatory damages is reasonable is ‘whether the award is roughly comparable to awards made in similar cases.’” *Smith v. Esicorp*, ARB Case No. 97-065, ALJ Case No. 93-ERA-16, ARB Dec. (Aug. 27, 1998), slip op. at 2, *quoting Gaballa v. The Atlantic Group*, Case No. 94-ERA-9, Sec’y Dec. (Jan. 18, 1996). In *Smith v. Esicorp*, the Board reviewed a series of earlier cases decided by the Secretary and the Board involving compensatory damages awards for mental pain and suffering ranging from \$5,000 in a case where the complainant showed only that he became moody and depressed and short tempered with his wife and children, to \$75,000 in a discriminatory discharge case where there was evidence of major depression supported by reports by a psychiatrist and a licensed clinical social worker. *Id.* at 3-4.

Complainant’s compensable injuries in this case stem from two instances in which the Air National Guard engaged in discriminatory referencing or blacklisting. In one of those instances, a negative reference was given to a records checking firm, not to a prospective employer. In the other instance, negative information was given to the Office of Personnel Management, some of which has been removed. Some references to the information still exist at OPM, although a government agency seeking information about Complainant would have to make a diligent search of her records to find the information.

Complainant testified that she experienced a variety of medical and personal problems after learning that she had been blacklisted by the Air National Guard, including severe anxiety attacks, inability to concentrate, a feeling that she no longer enjoyed “anything in life,” and marital conflict. *See* R. D. and O. on Remand at 8. Her description of her mental anguish was supported by a psychologist, Dr. Carter, who testified about the substantial effect the negative references had on Complainant. *Id.* Based on the level of harm experienced by Complainant, and comparing that harm with compensatory damage awards in other whistleblower cases, the ALJ recommended an award of \$45,000 for emotional distress, \$529.28 for past medical expenses related to such emotional distress, and an allotment of \$10,000 to pay for future medical expenses related to the Air National Guard’s retaliatory conduct, as the medical expenses are incurred.

Complainant argues that the damage award for emotional distress or mental anguish is insufficient, and that such awards under the environmental whistleblower statutes should be set at a level comparable to damage awards by courts or juries for violations of state or federal anti-discrimination rights statutes or in analogous tort actions (*e.g.*, violation of privacy rights). Complainant notes that the compensatory damage awards in these other types of cases often are substantially higher than the amounts recommended by the ALJ.

We reaffirm our long-standing policy that a key step in determining the amount of compensatory damages is a comparison with awards made in similar cases. *Smith v. Esicorp.* However, we agree with Complainant that damage awards under other discrimination or discrimination-related statutes can be instructive in setting damage awards in environmental whistleblower statutes before the Department of Labor, even though the levels of compensatory damages awarded under these other statutes are not controlling. We emphasize that there is no arbitrary upper limit on the amount of compensatory damages that may be awarded under the whistleblower protection provisions enforced by the Department; indeed, as a practical matter, exclusive reliance on damage awards in prior whistleblower cases easily could result in the level of compensatory damages becoming frozen in time, ignoring even such basic factors as inflation – a result that would be inconsistent with the statutory mandate that the victims of unlawful discrimination be compensated for the fair value of their loss.

Any attempt to set a monetary value on intangible damages such as mental pain and anguish involves a subjective judgment. Based on the record before us, we find that ALJ’s recommendation of an award of \$45,000 for emotional distress is reasonable, and we adopt it.

We also find that the ALJ’s award of \$529.28 for past medical expenses and \$10,000 for future medical expenses is reasonable in the circumstances of this case. It is difficult to determine in advance how many hours of counseling Complainant will require, but based on the amount she has already incurred, \$10,000 for future medical expenses is a reasonable approximation. The ALJ also ordered that Complainant submit her bills for medical treatment to Respondent for payment. We find that this is a reasonable procedure that will assure that Complainant is reimbursed for medical expenses actually incurred.

III. Compensatory damage award for injury to professional reputation.

The ALJ awarded \$25,000 for damage to Complainant's professional reputation based on two factual findings. He found that OPM still has adverse information on file about Complainant and that OPM provided this information to the Federal Highway Administration on two occasions. The presence of this information apparently did not interfere with Complainant's ability to obtain other jobs, because after leaving the Air National Guard she was hired by the Federal Highway Administration and by the Commonwealth of Virginia as an environmental specialist. Still, we agree with the ALJ's conclusion that Complainant's professional reputation will continue to be affected by the presence of this adverse information in OPM files, which would be available to any federal agency. The fact that the adverse personnel recommendation remains on file at OPM can be presumed to have an effect on Complainant's professional reputation, and a \$25,000 damage award for that injury is reasonable.

IV. Exemplary damages.

The ALJ denied an award for exemplary damages, finding that when the Air National Guard made the two negative references about Complainant, it did not act with reckless or callous disregard of Complainant's rights. We agree.

The Supreme Court has held that punitive damages may be awarded where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law . . ." *Smith v. Wade*, 461 U.S. 30, 51 (1983). The Court explained the purpose of punitive damages is

"to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts §908(1) (1979). The focus is on the character of the tortfeasor's conduct – *i.e.*, whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards.

Id. at 54. The record does not show that Lt. Colonel Purple, the Air National Guard supervisor who gave the negative references about Complainant, acted with the purpose or intent to harm Complainant or with reckless disregard for her rights. *See* Transcript of hearing 345. We adopt the ALJ's recommendation that punitive damages be denied.

V. Attorney fees and costs

The ALJ recommended an award of \$113,085.00 in attorney fees and \$12,930.13 in costs incurred through March 11, 1998. In addition, the ALJ recommended that Complainant be awarded \$830.81 for costs she incurred personally. Complainant has expressed support for these awards, and the Air National Guard has not opposed them. We adopt the ALJ's recommendations on the award of attorney fees and costs.

CONCLUSION

In light of these determinations, it is **ORDERED** that Respondent Secretary of the Air Force pay Complainant the following damages:

1. \$45,000 for mental pain and anguish;
2. \$25,000 for injury to professional reputation;
3. \$529.28 for past medical expenses
4. \$10,000 for future medical expenses, provided that Complainant obtains medical treatment for mental pain and suffering caused by Respondent's actions and submits her bills for that treatment to Respondent for payment.
5. \$113,085 in attorney fees for services rendered through March 11, 1998.
6. \$12,930.13 in costs incurred by Complainant's attorneys through March 11, 1998.
7. \$830.81 in costs incurred by Complainant between June 18, 1996 and March 11, 1998.

It is further **ORDERED** that Complainant may, within 20 days from the date of this Decision and Order, submit to this Board an itemized petition for additional attorney fees and other litigation expenses incurred after March 11, 1998. Complainant shall serve the petition on Respondent, who shall submit any response within 30 days after the date of this Decision and Order. This Board will issue a supplemental order after considering the additional attorney fee petition and any response.^{7/8/}

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

^{7/} Board Member E. Cooper Brown did not participate in the consideration of this case.

^{8/} Because this decision resolves all issues with the exception of the collateral issue of attorney fees and other litigation expenses, it is final and appealable. See *Fluor Constructors, Inc. v. Reich*, 111 F.3d 979 (11th Cir. 1997) (under the analogous employee protection provision of the Energy Reorganization Act, a decision that resolves all issues except attorney fees is final).